EXPLAINING THE LEGAL EFFECTS OF RECOGNITION

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Abstract Recognition in contemporary international law is generally seen as a declaratory act. This is indeed the only plausible explanation in situations where a new State emerges consensually and in the absence of territorial illegality. Unilateral secession and territorial illegality, however, create different legal circumstances in which the applicable rules of international law imply and even presuppose that (collective) recognition could have constitutive effects. This article therefore suggests that the interpretation of the legal nature of recognition and non-recognition should not start on the premise that recognition always merely acknowledges the fact of the emergence of a new State. This is not to say that States cannot exist without being recognized. Rather, the legal effects of recognition may depend on the mode of a certain (attempt at) State creation.

I. INTRODUCTION

Traditionally any discussion on recognition in international law considers two theories: constitutive and declaratory. The constitutive theory perceives recognition as 'a necessary act before the recognized entity can enjoy an international personality',[1] while the declaratory theory sees it as 'merely a political act recognizing a pre-existing state of affairs'.[2] In the constitutive perception, the question of 'whether or not an entity has become a state depends on the actions [ie recognitions] of existing states'.[3] However, the situation in which one State may be recognized by some States, but not by others, is an evident problem and thus a great deficiency of the constitutive theory. In the absence of a central international authority for granting recognition, this would mean that such an entity at the same time has and does not have an international personality.[4]

Most contemporary writers have therefore adopted a view that recognition is declaratory.[5] This means that a 'state may exist without being recognized, and

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[1] M Dixon, R McCorquodale and S Williams, *Cases and Materials in International Law* (5th edn, OUP 2011) 158.

[2] ibid.

[3] T Grant, *The Recognition of States: Law and Practice in Debate and Evolution* (Praeger 1999) 2.

[4] J Brierly, *The Law of Nations* (Clarendon Press 1963) 138.

[5] See, eg, D Harris, *Cases and Materials on International Law* (7th edn, Sweet & Maxwell 2010) 131.

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if it does exist, in fact, then whether or not it has been formally recognized by other states, it has a right to be treated by them as a state'.[6] According to this view, when recognition is granted, other States merely recognize the pre-existing situation—that of the existence of a new State.

Recent practice of new State creations indeed demonstrates that, in some situations, international recognition merely *acknowledges* the emergence of a new State. Even if recognition is virtually universally withheld, sometimes there will be no doubt that the non-recognized entity is a State.[7] But this is not always the case. This article will demonstrate that international involvement, possibly also through the act of recognition, may sometimes produce rather than merely acknowledge the fact of an emergence of a new State. Does this mean that, under some circumstances, recognition can be constitutive?

In one explanation, 'recognitions [in some instances] have been "constitutive", not in the sense of creating a legal personality, but in the sense of contributing to political conditions which allowed the recognized political entity to consolidate its effectiveness'.[8] In other words, recognition may be part of an international involvement that helps the newly emerged State to meet the statehood criteria, but this is not to say that such States are created through recognition. It may well be that this has been one of the patterns in post-1990 State creations;[9] however, this might not tell the whole truth about the constitutive effects of the act of recognition in contemporary international law.

This article revisits the practice of non-colonial State creations in order to identify the legal circumstances in which recognition is clearly declaratory and those in which the declaratory nature of recognition is questionable. It draws a distinction between two kinds of situation: first, where the predecessor State either consents to secession or its international personality is extinguished; and, second, where an entity seeks secession unilaterally. The article demonstrates that the concept of unilateral secession in international law, at least in theory, presupposes that international recognition could create a State. As the recent example of Kosovo illustrates, however, ascribing constitutive effects to the act of recognition comes with caveats.

Further, the article shows that constitutive effects of recognition are implied by another concept in contemporary international law – the obligation of (collective) non-recognition – which is applicable where effective entities emerge illegally.[10] In one view, illegally created effective entities are

[6] Brierly (n 4) 138.

[7] See below, section II.C.

[8] A Peters, 'Statehood after 1989: "*Effectivités*" between Legality and Virtuality' (2010) Proceedings of the European Society of International Law 3 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1720904> accessed 20 February 2012.

[9] See below, section II.B.

[10] See International Law Commission (ILC) Articles on Responsibility of States for Internationally Wrongful Acts (28 January 2002) UN Doc A/RES/56/83 (ILC Articles on State Responsibility) arts 40 and 41. For more, see below, nn 149–51.

non-States;[11] in another view they are 'illegal States'.[12] Neither explanation is able to explain convincingly why universal recognition of an illegally created effective entity, or of an 'illegal State', would not have constitutive effects. In an alternative perception, the obligation to withhold recognition can only be logically explained if it is accepted that recognition is a constitutive act.[13] But this explanation is also problematic, in light of contemporary theory and practice in international law governing the creation and recognition of States.

This article does not try to make an argument that recognition should be seen as a constitutive act. It rather shows that, despite the general perception of recognition as being declaratory, there exist concepts in international law that imply or even presuppose that in some circumstances recognition could create a new State. Explaining these concepts from the premise that recognition is always declaratory leads to logical inconsistencies; however, this is not to say that a State cannot exist without being recognized.

II. DECLARATORY RECOGNITION AT WORK

In the UN Charter era, it is very unlikely that a new State would emerge without the consent of a parent State.[14] Indeed, outside colonialism the exercise of the right of self-determination is limited by the principle of territorial integrity of States.[15] A wave of non-colonial new State creations has been witnessed in the post-1990 era. This section revisits the practice of these State creations through the perspective of legal effects of recognition and explains the legal circumstances in which the existence of a new State is merely

[11] See J Crawford, *The Creation of New States in International Law* (2nd edn, OUP 2006) 107.

[12] See S Talmon, 'The Constitutive versus the Declaratory Doctrine of Recognition: Tertium Non Datur?' (2004) 75 British YB Int'l L 101, 125.

[13] C Hillgruber, 'The Admission of New States to the International Community' (1998) 9 EJIL 491, 494.

[14] See, eg, Crawford (n 11) 403, recalling a number of unsuccessful attempts at unilateral secession in the UN Charter era and arguing: 'Where the government of the State in question has maintained its opposition to the secession, such attempts have gained virtually no international support or recognition, and this has been true even when other humanitarian aspects of the situation have triggered widespread concern and action.'

[15] The elaboration of the principle of territorial integrity of States in the Declaration on Principles of International Law provides:

> Nothing in the foregoing paragraphs [referring to the right of self-determination] shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.

(Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations (24 October 1970) UNGA Res 2625 annex, principle 5).

acknowledged by the international community. In other words, what are the international legal circumstances that make the declaratory theory work?

A. Consensual State Creations

At the end of the Cold War, three (former) socialist federations were dissolved —the Socialist Federal Republic of Yugoslavia (SFRY), the Soviet Union and Czechoslovakia. The dissolutions of the Soviet Union and Czechoslovakia were consensual. The Soviet Union was transformed into the Commonwealth of Independent States (CIS) by the adoption of the Minsk Agreement[16] and the Alma Ata Protocol.[17] The two instruments created a new legal fact that 'the Union of Soviet Socialist Republics as a subject of international law and a geopolitical reality no longer exist[ed]'.[18] All newly emerged States in the territory of the former Soviet Union were rapidly admitted to the UN and no objection was raised with regard to their legal status.[19] Moreover, it was mutually accepted by members of the CIS that Russia continued the membership of the Soviet Union in international organizations.[20]

[16] See Agreement on the Establishment of the Commonwealth of Independent States (1992) 31 ILM 138 (Minsk Agreement). The Minsk Agreement was adopted on 8 December 1991 by the presidents of Belarus, Russia and Ukraine. On 21 December 1991, a protocol to the Minsk Agreement was adopted by the remaining Soviet republics, with the exception of Georgia, by way of which the CIS was extended to these former republics from the moment of ratification of the Agreement.

[17] See Protocol to the Agreement Establishing the Commonwealth of Independent States signed at Minsk on 8 December 1991 by the Republic of Belarus, the Russian Federation (RSFSR) and Ukraine (1992) 31 ILM 147 (Alma Ata Protocol). On the same day, 11 Soviet Republics (in the absence of Georgia), adopted the Alma Ata Declaration, which, *inter alia,* declared: 'With the establishment of the Commonwealth of Independent States, the Union of Soviet Socialist Republics ceases to exist' (Alma Ata Declaration (1992) 31 ILM 147).

[18] Minsk Agreement para 1.

[19] Moldova, Kazakhstan, Kyrgyzstan, Uzbekistan, Armenia, Tajikistan, Turkmenistan and Azerbaijan all became members of the UN on 2 March 1992; Georgia, which made its application belatedly, was admitted on 31 July 1992. See UNGA Res 46/223 (Moldova), UNGA Res 46/224 (Kazakhstan), UNGA Res 46/225 (Kirgizstan), UNGA Res 46/226 (Uzbekistan), UNGA Res 46/227 (Armenia), UNGA Res 46/228 (Tajikistan), UNGA Res 46/229 (Turkmenistan), UNGA Res 46/230 (Azerbaijan), UNGA Res 46/241 (Georgia). Ukraine and Belarus were original members of the UN and continued their membership. See, eg, A Aust, *Handbook of International Law* (CUP 2005) 18.

[20] Decision by the Council of Heads of State of the Commonwealth of Independent States (1992) 31 ILM 138 para 1. Russia's continued membership of the Soviet Union in the UN is, however, not uncontested by legal scholars. Indeed, this was not an example of a State's name change or secession of part of the Soviet Union's territory. Rather, it was an example of dissolution and 'with the demise of the Soviet Union . . . its membership in the UN should have automatically lapsed and Russia should have been admitted to membership in the same way as the other newly-independent republics (except for Belarus and Ukraine)' (Y Blum, 'Russia Takes Over the Soviet Union's Seat at the United Nations' (1992) 3 EJIL 354, 359). As argued, the former Soviet republics agreed that Russia would continue the Soviet Union's membership in the UN. However, '[t]he correct legal path to this end would have been for all the republics of the Soviet Union except Russia to secede from the union, thus preserving the continuity between the Soviet Union and Russia for the UN membership purposes' (ibid 361). Nevertheless, it is questionable whether such a path was possible in the rather complicated Soviet political situation in 1991.

The dissolution of Czechoslovakia was also a matter of negotiated settlement[21] and the international personality of the federation was (consensually) extinguished.[22] As a consequence, there was no doubt that the two constitutive republics of Czechoslovakia had become States. Czechoslovakia ceased to exist on 31 December 1992.[23] On 1 January 1993, the Czech Republic and Slovakia were proclaimed independent States.[24] International recognition followed promptly and the two new States were admitted to the UN on 19 January 1992.[25] In the absence of the predecessor State, acquiring statehood was not dependent on international recognition.

The situation of the SFRY was more complicated, owing to the non-consensual nature of its dissolution, and will be considered below. At this point the section turns to secession with consent of the parent State.

Prior to the dissolution of the Soviet Union, Estonia, Latvia and Lithuania (re)gained independence from that federation. It is debatable whether the three Baltic States were newly created States in 1991 or whether their statehood from the interwar period was revived. Whatever position one takes on the legal effects of the Ribbentrop–Molotov Pact,[26] it is notable that '[t]he Security Council did not consider the applications for recognition made by the Baltic States until 12 September 1991, six days after the Soviet Union had agreed to recognize them'.[27] Estonia, Latvia and Lithuania were ultimately admitted to the UN on 17 September 1991.[28] As Crawford notes, this suggests that 'the position of the Soviet authorities was treated as highly significant even in a case of suppressed independence'.[29] Thus, even in the case of the Baltic States it was the consent of the parent State that was crucial for producing the new legal reality, that of the existence of new States. Subsequent international recognition merely acknowledged this fact.

The consent of the parent State was also of crucial importance in the case of Eritrea. The political circumstances may well have been complex, and the new government of Ethiopia, which ultimately consented to Eritrea's independence, came to power with the support of the Eritrean People's Liberation Front.[30]

[21] E Stein, *Czechoslovakia: Ethnic Conflict, Constitutional Fissure, Negotiated Breakup* (University of Michigan Press, 1997) 45.

[22] See also Crawford (n 11) 402. [23] ibid. [24] ibid.

[25] GA Res 47/221 (19 January 1993) (Czech Republic); GA Res 47/222 (19 January 1993) (Slovakia).

[26] Article 1 of the Secret Additional Protocol to the Ribbentrop–Molotov Pact reads: 'In the event of a territorial and political rearrangement in the areas belonging to the Baltic States (Finland, Estonia, Latvia, Lithuania), the northern boundary of Lithuania shall represent the boundary of the spheres of influence of Germany and U.S.S.R. In this connection the interest of Lithuania in the Vilna area is recognized by each party' (German-Soviet Non-Aggression Pact (Ribbentrop–Molotov Pact) (23 August 1939) Secret Additional Protocol, art 1 <http://www.fordham.edu/halsall/mod/1939pact.html> accessed 20 February 2012). For more on the legal issues surrounding the re-emergence of the Baltic States as independent States, see C Warbrick, 'Recognition of States' (1992) 41 ICLQ 473, 474. [27] Crawford (n 11) 394.

[28] UNGA Res 46/4 (17 September 1991) (Estonia); UNGA Res 46/5 (17 September 1991) (Latvia); UNGA Res 46/6 (17 September 1991) (Lithuania). [29] Crawford (n 11) 394.

[30] See Crawford (n 11) 402.

However, from the point of view of international law, Eritrea declared independence with the consent of the central government of Ethiopia. After an overwhelming majority gave its support to independence at a UN observed referendum,[31] and given Ethiopia's consent, there was no doubt that Eritrea was a new State. This was confirmed by its admission to the UN on 28 May 1993.[32]

Montenegro's secession was rooted in the constitutional arrangement that was the outcome of internationalized negotiations between unionists and those favouring secession. In 2003, the Federal Republic of Yugoslavia (FRY) was, upon significant involvement of the European Union, transformed into the very loose State Union of Serbia and Montenegro (SUSM).[33] The Constitution of this transitional State provided for a clear mechanism for secession.[34] After independence was endorsed at the referendum, held on 21 May 2006, on 3 June the Montenegrin Parliament adopted the Declaration of Independence.[35] International recognition followed promptly; on 30 June 2006 Montenegro was admitted to the UN.[36]

Montenegro is thus another example of a consensual emergence of a new State. Indeed, Article 60 of the Constitution of the SUSM not only provided for a mechanism for secession but even regulated the questions of state succession

[31] ibid. See also UNGA Res 47/114 (5 April 1993) preamble, para 3.

[32] UNGA Res 47/230 (28 May 1993).

[33] After the end of the Milošević regime in 2000, Montenegro's pro-independence forces became more prominent. However, given the armed conflict associated with the dissolution of the SFRY, the international community feared pro-independence pressures could result in Montenegro's unilateral declaration of independence and potentially lead to turmoil in Montenegro itself and more broadly in the region. In response, the EU brokered a compromise between those who favoured independence and those who advocated a continued union with Serbia. The result of this compromise was the Constitution of the SUSM. See International Crisis Group Briefing No 169 Montenegro's Independence Drive (7 December 2006) 1.

[34] Article 60 of the Constitution of the SUSM provided:

> After the end of the period of three years, member states shall have the right to begin the process of a change of status of the state or to secede from the State Union of Serbia and Montenegro.
>
> The decision on secession from the State Union of Serbia and Montenegro shall be taken at a referendum.
>
> In case of secession of the state of Montenegro from the State Union of Serbia and Montenegro, international documents referring to the Federal Republic of Yugoslavia, especially the United Nations Security Council Resolution 1244, shall only apply to the state of Serbia as a successor.
>
> The member state that resorts to the right to secession shall not inherit the right to international personality and all disputes shall be solved between the successor-state and the seceded state.
>
> In the case that both states, based on the referendum procedure, opt for a change of the state status or independence, the disputed questions of succession shall be regulated in a process analogous to the case of the former Socialist Federal Republic of Yugoslavia.

See the Constitution of the State Union of Serbia and Montenegro (2003) art 60 (my translation).

[35] Declaration of Independence of the Republic of Montenegro, *Official Gazette of the Republic of Montenegro* No 36/06 (3 June 2006).

[36] UNGA Res 60/264 (28 June 2006).

and international personality.[37] According to this provision, the international personality of the SUSM was continued by Serbia,[38] and Montenegro was considered to be a new State. It was Article 60 of the Constitution of the SUSM that made secession consensual. However, it is notable that the Constitution of the transitional State Union was adopted upon significant involvement of the EU.

International involvement was even more prominent in the situation of East Timor, where it was channelled through the actions of the UN. East Timor may be seen as a colonial situation in which the exercise of the right of self-determination was not limited by the principle of territorial integrity of States.[39] Yet the real question was independence from Indonesia, not independence from Portugal. For this reason, East Timor is not a classical situation of decolonization and needs to be considered in the context of the emergence of new States outside the colonial framework.

The history of foreign rule of East Timor has been thoroughly examined elsewhere.[40] For the purpose of this article it is important to recall that, in 1999, the new Indonesian leadership indicated that it would be willing to discuss the future legal status of East Timor.[41] On 30 August 1999, a referendum on that future legal status was held under UN auspices.[42] The people of East Timor rejected an autonomy arrangement within Indonesia and set the course toward independence. This decision led to an outbreak of violence, initiated by Indonesian forces.[43] As a response, on 15 September 1999 the Security Council, acting under Chapter VII of the UN Charter, adopted Resolution 1264, which, *inter alia*, authorized 'the establishment of a multinational force under a unified command structure . . . to restore peace and security in East Timor'.[44] Subsequently, on 25 October 1999, the Security Council, acting under Chapter VII of the UN Charter, adopted Resolution 1272, with which it established the organs of international territorial administration in East Timor.[45]

On 22 March 2002, the text of the new Constitution was signed by members of the East Timorese political elite, religious leaders and representatives of the civil society.[46] It was determined that the Constitution would enter into force on 20 May 2002, which was the day foreseen for the proclamation of

[37] See n 34. [38] ibid. [39] See n 10.

[40] See generally B Singh, *East Timor, Indonesia and the World: Myths and Realities* (Singapore Institute of International Affairs 1995); H Krieger and D Rauschning, *East Timor and the International Community: Basic Documents* (CUP 1997); J Taylor, *East Timor: The Price of Freedom* (Zed Books 1999); P Hainsworth and S McCloskey (eds), *The East Timor Question: The Struggle for Independence from Indonesia* (IB Tauris 2000); I Martin, *Self-determination in East Timor: The United Nations, the Ballot, and International Intervention* (Lynne Rienner Publishers 2001).

[41] See R Wilde, *International Territorial Administration: How Trusteeship and the Civilizing Mission Never Went Away* (OUP 2008) 181.

[42] See UNSC Res 1236 (7 May 1999) esp paras 4, 8, 9. [43] ibid.

[44] UNSC Res 1264 (15 September 1999) para 3.

[45] UNSC Res 1272 (25 October 1999) para 1. [46] ibid para 4.

independence.[47] East Timor's course to independence was otherwise affirmed in Security Council Resolution 1338, adopted on 31 January 2001.[48] After the declaration of independence on 20 May 2002,[49] international recognition promptly followed and East Timor was admitted to the UN on 27 September 2002.[50]

East Timor ultimately emerged as a new State with Indonesia's consent. It was, however, the UN involvement in the situation that was crucial for producing this political consent, the legal significance of which was that secession was not unilateral. The emergence of a new State was only then acknowledged by international recognition and UN membership.

Most recently, South Sudan's path to independence followed from the legal regime established under the Comprehensive Peace Agreement, signed on 9 January 2005, between the central government of Sudan and the Sudan People's Liberation Movement/Sudan People's Liberation Army.[51] The Comprehensive Peace Agreement resulted from the efforts of the regional peace initiative to end the civil war.[52]

The Agreement specified that the people of South Sudan have the right of self-determination and shall determine their future legal status at a referendum.[53] The Protocol further established a six-year interim period in which the internationally monitored referendum was to take place.[54] The parties later also agreed on the implementation modalities of the permanent ceasefire and security arrangement.[55] This Agreement not only made references to self-determination and an independence referendum but also invoked some specific

[47] ibid paras 2 and 4.

[48] UNSC Res 1338 (31 January 2001). Notably, this resolution was not adopted under Chapter VII of the UN Charter.

[49] See BBC, 'East Timor: Birth of a Nation' (19 May 2002) <http://news.bbc.co.uk/1/hi/world/asia-pacific/1996673.stm> accessed 20 February 2012.

[50] UNGA Res 57/3 (27 September 2002).

[51] See The Comprehensive Peace Agreement (2005) <http://www.sd.undp.org/doc/CPA.pdf> accessed 20 February 2012.

[52] The Comprehensive Peace Agreement comprises texts of previously signed agreements and protocols. These are: the Machakos Protocol (20 July 2002); the Protocol on Power Sharing (26 May 2004); the Agreement on Wealth Sharing (7 January 2004); the Protocol on the Resolution of the Conflict in the Abyei Area (26 May 2004); The Protocol on the Resolution of the Conflict in Southern Kordofan and Blue Nile States (26 May 2004); the Agreement on Security Arrangements (25 September 2003); the Permanent Ceasefire and Security Arrangements Implementation Modalities and Appendices (30 October 2004) and the Implementation Modalities and Global Implementation Matrix and Appendices (31 December 2004). For more information, see The Comprehensive Peace Agreement, Chapeau of the Comprehensive Peace Agreement xii para 2.

[53] Comprehensive Peace Agreement, Machakos Protocol (20 July 2002) Part A s 1.3.

[54] ibid Part B s 2.5. The six-year interim period started at the time of conclusion of the Comprehensive Peace Agreement.

[55] See Comprehensive Peace Agreement, Agreement on Permanent Ceasefire and Security Arrangements Implementation Modalities between the Government of Sudan (GOS) and the Sudan People's Liberation Movement/Sudan people's Liberation Army (SPLM/SPLA) During the Pre-Interim and Interim Periods (31 December 2004).

solutions to be implemented in the event of South Sudan's decision for independence.[56]

After the adoption of the Comprehensive Peace Agreement, Sudan promulgated a new interim constitution, which granted substantive autonomy to Southern Sudan.[57] The Constitution further specified that a referendum on the future status of Southern Sudan should be held six months before the end of the six-year interim period.[58]

The interim Constitution of Sudan thus defined Southern Sudan as a self-determination unit and, in principle, created a 'constitutional right to secession'. The right was then put into operation through the Southern Sudan Referendum Act, promulgated on 31 December 2009. Article 41 of the Act specified the referendum rules and made specific provisions for the required quorum (60 per cent of all eligible to vote) as well as the winning majority (50 per cent plus one vote of the total number of votes cast).[59] Article 66 of the Act specified that the decision taken at the referendum would be binding;[60] Article 67, *inter alia*, specified that in the event of Southern Sudan's vote for secession, the government should apply the constitutional provisions that foresaw Southern Sudan's withdrawal from the Sudanese institutional arrangement.[61]

The option for secession was given overwhelming support of 98.83 per cent, at a turnout of 97.58 per cent, and the central government of Sudan announced that it would respect the referendum results.[62] South Sudan declared independence on 9 July 2011 and the central government of Sudan announced its formal recognition a day before the declaration of independence was issued.[63]

South Sudan's path to independence was marked by a lengthy civil war, atrocities and a grave humanitarian situation.[64] However, these circumstances did not create a 'right to independence'. In terms of international law, it is significant that South Sudan did not become an independent State before the central government formally agreed to hold a binding referendum on independence, at which secession was supported by an overwhelming majority. South Sudan is thus a State creation with the approval of the parent State. The mechanism for secession was rooted in the 2005 Peace Agreement and the constitutional arrangement that resulted from this agreement.

[56] See ibid sections 17.8, 20.1, 20.2 and 21.2.
[57] Interim National Constitution of the Republic of Sudan (2005).
[58] ibid art 222(1).
[59] Southern Sudan Referendum Act (31 December 2009) art 41, paras 2 and 3 <http://saycsd.org/doc/SouthernSudanReferendumActFeb10EnglishVersion.pdf> accessed 20 February 2012.
[60] ibid art 66.
[61] ibid art 67(2).
[62] See, eg, BBC, 'President Omar al-Bashir Gives South Sudan His Blessing' (7 July 2011) <http://www.bbc.co.uk/news/world-africa-14060475> accessed 20 February 2012.
[63] See BBC, 'South Sudan Counts Down to Independence' (8 July 2011) <http://www.bbc.co.uk/news/world-africa-14077511> accessed 20 February 2012.
[64] See above, n 52.

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International recognition of South Sudan followed promptly.[65] On 14 July 2011, South Sudan became a member of the UN.[66]

This section has shown that, where the parent State either dissolves itself or consents to the secession of a part of its territory, the emergence of a new State is not objected to and is only *declaratorily* acknowledged by international recognition. In some situations the consent of the parent State is produced internationally and the international involvement may well be important for the emergence of a new State. But this is not to say that a new State is constituted through recognition. International involvement only creates political circumstances in which a parent State is willing to accept independence of a part of its territory. The legal effect of such acceptance is that this State waives its claim to territorial integrity; there is therefore no doubt that a part of its (former) territory has become a separate State.

B. Non-consensual Dissolution: The Case of the SFRY

In the dissolution of the SFRY, the involvement of the European Community (EC) played a crucial role. As part of its response to the crisis in Yugoslavia, the so-called 'Badinter Commission' was established.[67] The Badinter Commission expressly held that recognition is declaratory and that it did not perceive itself as a body that creates States. Such a perception is obvious from the reasoning in Opinion 11, in which the Commission identified the critical dates for the emergence of new States. These dates were not linked to recognition;[68] they were identified subsequently, for State succession purposes, and are not unproblematic.[69] Particularly interesting in the context of this article is the pronouncement that Slovenia and Croatia became States on 8 October 1991.

[65] See BBC, 'South Sudan: World Leaders Welcome New Nation' (9 July 2011) <http://www.bbc.co.uk/news/world-africa-14095681> accessed 20 February 2012.

[66] See UN Doc GA/11114 (14 July 2011).

[67] In response to the crisis, on 27 August 1991 the European Community (EC) and its Member States founded the Conference on Yugoslavia, under the auspices of which the Arbitration Commission was established. The Arbitration Commission was chaired by the President of the French Constitutional Court, Robert Badinter, therefore it is commonly referred to as the Badinter Commission. For more see A Pellet, 'The Opinions of the Badinter Arbitration Committee: A Second Breath for the Self-determination of Peoples' (1992) 3 EJIL 178, 178.

[68] The Badinter Commission held that Slovenia and Croatia became States on 8 October 1991 (the day of the expiry of the EC-imposed moratorium on their respective declarations on independence), Macedonia on 17 November 1991 (the day of the adoption of a new constitution), Bosnia-Herzegovina on 6 March 1992 (the day of the proclamation of referendum results) and the FRY on 27 April 1992 (the day of the adoption of a new constitution): Badinter Commission, Opinion 11 (16 July 1993) para 4.

[69] In Opinion 11 the Badinter Commission dealt with questions of succession after the dissolution of the SFRY had been completed; for this purpose it had to establish critical dates on which the SFRY's former republics became independent States. See Badinter Commission, Opinion 11, para 2.

When the Badinter Commission delivered its Opinion 11, on 16 July 1993, Slovenia and Croatia had already been recognized as independent States and were members of the UN.[70] Moreover, at this point two relevant previous opinions of the Commission also existed: that the SFRY was in the process of dissolution (Opinion 1)[71] and that this process was completed (Opinion 8).[72] However, when Slovenia and Croatia were deemed to have become States, the authority holding that the process of dissolution was underway in the SFRY had not yet been given. Moreover, Opinion 11 was supported by the fact that four out of the SFRY's six constitutive republics had declared independence,[73] but on 8 October 1991 Bosnia-Herzegovina had not yet declared independence[74] and Macedonia's declaration was fairly recent.[75] The prevailing view on that date was that Slovenia and Croatia sought unilateral secession.[76] In such a circumstance the acquisition of statehood is much more questionable and, arguably, may depend on recognition.[77]

However, recognition on 8 October 1991 was not certain. In this regard Caplan notes: 'As much as the Slovenes may have wished and hoped for EC recognition, it was really not until the EC Council of Ministers meeting of 16 December [1991] that they would be assured of it.'[78] As he continues, 'if one reads history of this period backwards from its final denouement, the uncertainty is less apparent'.[79] This is what the Badinter Commission did when it subsequently held that Slovenia and Croatia became States on 8 October 1991 – it read history backwards. It was the opinion of the Commission, delivered only on 29 November 1991,[80] that established the universally accepted authority stating that the SFRY was in the process of dissolution. On 8 October of that year, however, the legal status of Slovenia

[70] See UNGA Res 46/236 (22 May 1992) and UNGA Res 46/238 (22 May 1992).

[71] Badinter Commission, Opinion 1 (29 November 1991) para 3.

[72] Badinter Commission, Opinion 8 (4 July 1992) para 4.

[73] Badinter Commission, Opinion 1, para 2.

[74] Bosnia-Herzegovina declared independence on 15 October 1991. See *Official Gazette of the Socialist Republic of Bosnia-Herzegovina* 32 (15 October 1991).

[75] Macedonia declared independence on 17 September 1991. See the Declaration on the Sovereignty and Independence of the Republic of Macedonia, 17 September 1991, reprinted in S Trifunovska, *Yugoslavia through Documents: From its Creation to its Dissolution* (Martinus Nijhoff 1994) 345–7.

[76] See Grant (n 3) 152–3: 'Though the United States, the Soviet Union, and various West European States and organizations stated their disapproval of Croat and Slovene unilateral declarations of independence, Germany quickly began to suggest that it would extend recognition to the putative States. As early as August 7, 1991, the German government expressed support for the secessionists.' See also D Raič, *Statehood and the Law of Self-determination* (Kluwer Law International 2002) 352, arguing that, on 8 October 1991, the people of Croatia possessed the right to secession based on the 'remedial secession' doctrine.

[77] See *Reference re Secession of Quebec* [1998] 2 SCR 217 (Supreme Court of Canada) (hereafter *Quebec* case) para 155, where the Court argued that '[t]he ultimate success of . . . [unilateral] secession would be dependent on recognition by the international community'. For more, see below, text to n 106.

[78] R Caplan, *Europe and Recognition of New States in Yugoslavia* (CUP 2005) 105–6.

[79] ibid 104.

[80] Badinter Commission, Opinion 1.

and Croatia was at least ambiguous and it may well be that in the general perception they were actually not States.

The opinions of the Badinter Commission were formally not legally binding. Nevertheless, they were important in shaping the State practice of the entire international community; after their finding it was not disputed that the SFRY was a case of dissolution. This view was even adopted by the UN Security Council.[81] As a consequence, the universally accepted legal position was that the international personality of the SFRY was extinguished.[82] In the absence of a predecessor State, international recognition was ultimately a declaratory act.

C. Political Non-recognition and the Declaratory Theory: The Federal Republic of Yugoslavia and the Former Yugoslav Republic of Macedonia

Despite the universally accepted view that the SFRY's international legal personality was extinguished, the FRY continued to claim continuity with the international personality of the FRY, and therefore did not apply for membership of the UN before the end of the Milošević regime. For this reason the FRY was only admitted to the UN on 1 November 2000.[83] While non-admission to the UN can be ascribed simply to the absence of an application for membership, the question of non-recognition remains more controversial. Since the FRY did not seek recognition according to the procedure established under the EC Declaration on Yugoslavia,[84] it remained universally unrecognized.

This does not mean that the FRY was not treated as a State. Indeed, the FRY appeared before the International Court of Justice (ICJ) in the *Bosnia Genocide* case and the Court established that the case was admissible although the FRY was universally non-recognized at that time.[85] The position of the ICJ thus clearly shows that recognition is not necessary for an entity to be considered as a State.

The Badinter Commission held in its Opinion 11 that the FRY became a State on 27 April 1992, the day when it adopted its constitution.[86] This critical

[81] UNSC Res 757 (30 May 1992) and UNSC Res 777 (19 September 1992).

[82] UN Security Council resolution 777 preamble, para 2, for example, takes the view that 'the state formerly known as the Socialist Federal Republic of Yugoslavia has ceased to exist'.

[83] UNGA Res 55/12 (1 November 2000). Some statements made by officials of the Republic of Serbia imply that Serbia still holds that it inherited the international personality of the former SFRY. When addressing the Security Council after Kosovo's declaration of independence, the President of Serbia, Boris Tadić made the following statement: 'Serbia, let me recall, is a founding State Member of the United Nations' (UN Doc S/PV.5838 (18 February 2008) 4).

[84] The EC Declaration on Yugoslavia was a document adopted at the meeting of the EC Council of Ministers on 16 December 1991 and was part of the broader EC involvement in the dissolution of the SFRY. See EC Declaration on Yugoslavia (16 December 1991), reprinted in Trifunovska (n 75) 474. The document is important because it established a procedure for granting recognition to the former republics of the SFRY.

[85] *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia)* (Preliminary Objections) [1996], ICJ Rep 596, 622 (*Bosnia Genocide* case) para 45.

[86] Badinter Commission, Opinion 11, para 7.

date was also accepted by the ICJ in the *Bosnia Genocide* case.[87] However, the United Kingdom, for example, recognized the FRY on 9 April 1996.[88] Its denial of recognition for this long has been described as 'overtly political'.[89]

The non-recognition of the FRY was somewhat unusual because the FRY denied that there was any new State creation in its case.[90] Further, other States did not deny that the FRY was a State; their legal position was rather that it did not continue the international personality of the SFRY. The FRY was, however, deemed to be a successor to rights and duties of the SFRY – albeit not the only one – and non-recognition did not influence this question.

Although the political circumstances in Macedonia were different, this was another example of political non-recognition. No doubt existed that Macedonia actually was a State. While the Badinter Commission recommended that EC Member States should grant recognition,[91] Greece was not willing to recognize Macedonia under this name.[92] Consequently, Macedonia remained unrecognized by the EC Member States until 16 December 1993, and even then it was recognized under the compromise name 'The Former Yugoslav Republic of Macedonia' (FYR Macedonia).[93] On 8 April 1993, prior to recognition by the EC, the FYR Macedonia had already become a member of the UN.[94]

For more than a year, non-recognition of Macedonia (which had origins in the EC's internal policy) had been virtually universal, with only Bulgaria, Turkey and Lithuania having granted recognition, under the original name, before admission of the FYR Macedonia to the UN.[95] This situation clearly had a political character, as the duty to withhold recognition on legal grounds did not apply.[96] Moreover, as Macedonia's former parent State no longer existed,[97] this was not a case of unilateral secession.

The fact that Macedonia remained almost universally non-recognized for some time does not mean it was not a State in that period. Rather, this was an

[87] *Bosnia Genocide* case, para 17. The Court did not make a direct argument that the FRY became a State. This date was rather invoked in the context of the question of when the FRY became a party to the Genocide Convention, to which the SFRY was previously a party. However, the Court's acceptance that the FRY became a State Party to the Genocide Convention on the day when it adopted its new constitution means that the Court thus also accepted that this was the date when the FRY became a State.

[88] HC Deb 7 May 1996, vol 277, col 89 <http://www.publications.parliament.uk/pa/cm199596/cmhansrd/vo960507/text/60507w19.htm> accessed 22 February 2012.

[89] Dixon, McCorquodale and Williams (n 1) 163.

[90] This problem is also pointed out in Opinion 11 of the Badinter Commission: 'There are particular problems in determining the date of State succession in respect of the Federal Republic of Yugoslavia because that State considers itself to be the continuation of the Socialist Federal Republic of Yugoslavia rather than a successor State': Badinter Commission, Opinion 11, para 7.

[91] See Badinter Commission, Opinion 6 (11 January 1992) para 4.

[92] See M Craven, 'What's in a Name? The Former Yugoslav Republic of Macedonia and Issues of Statehood' (1995) 16 Australian YB Intl'l L 199, 199–200.

[93] See Crawford (n 11) 398.

[94] UNGA Res 47/225 (8 April 1993).

[95] See R Rich, 'Recognition of States: The Collapse of Yugoslavia and the Soviet Union' (1993) 4 EJIL 36, 52.

[96] cf n 149.

[97] See the Badinter Commission, Opinion 9 (4 July 1992).

example of political non-recognition. This was true even for the EC, a good example being the Declaration on the Former Yugoslav Republic of Macedonia, which the EC and its Member States adopted on 1 and 2 May 1992. The Declaration expressed the willingness of the EC Member States 'to recognise that State [Macedonia] as a sovereign and independent State, within its existing borders, and under a name that can be accepted by all parties concerned'.[98] The use of the term 'State' rather than, for example, 'entity' clearly implies that Macedonia's attributes of statehood were not in dispute; it was simply that the EC did not want to enter into relations with Macedonia under its constitutional name.[99] It should also be noted that, in its Opinion 11, the Badinter Commission held that Macedonia became a State on 17 November 1991, the day when it adopted a new constitution that proclaimed Macedonia a sovereign State.[100]

The FRY and Macedonia are thus good examples of the declaratory theory at work. This section has shown that, where secession is either approved by the predecessor State or the latter no longer exists, the emergence of new States is not controversial and recognition merely *declaratorily* acknowledges the new international legal situation. The following sections will demonstrate, however, that the declaratory theory faces limitations in two kinds of situation: unilateral secession and where an entity tries to emerge as a State illegally and foreign States owe an obligation *erga omnes* to withhold recognition. Unlike the cases of the FRY and Macedonia, non-recognition in the latter circumstance is not political but required by law.

III. UNILATERAL SECESSION AND CONSTITUTIVE EFFECTS OF RECOGNITION

This section turns to the concept of unilateral secession: that is, the parent State continues to exist and does not consent to independence of a part of its territory. Arguably, if an entity tries to emerge as a State unilaterally, the only way of doing so is through international recognition. In turn, recognition may be constitutive. This conclusion needs to be accompanied by certain caveats, which are outlined in the examples of Bangladesh and Kosovo.

A. Unilateral Secession: Admitting the Constitutive Theory Through the Back Door

Unilateral secession describes a situation in which an entity emerges as a State without the consent of its parent State. In such circumstances, the claim to territorial integrity is not waived and it remains ambiguous whether or not a new State has emerged. Outside colonial situations, there is no right to

[98] EC Declaration on the Former Yugoslav Republic of Macedonia, Informal Meeting of Ministers of Foreign Affairs, Guimaracs, 1 and 2 May 1992, reprinted in C Hill and K Smith, *European Foreign Policy: Key Documents* (Routledge 2000) 376.

[99] See also Craven (n 92) 207–18.

[100] Badinter Commission, Opinion 11, para 5.

independence;[101] and, despite some contrary views,[102] it seems to be generally accepted that international law is neutral on the question of unilateral secession.[103] This means that unilateral secession is not an entitlement under international law, yet there is no explicit prohibition of this mode of State creation. Such an interpretation evidently follows even from the elaboration of the principle of territorial integrity of States in the Declaration on Principles of International Law. In the context of limitations on the right of self-determination, the elaboration notably uses neutral language; independence is not 'encouraged' or 'authorized', but it is not explicitly prohibited.[104]

The fact that unilateral secession is neither endorsed nor prohibited by international law was acknowledged by the Supreme Court of Canada in the *Quebec* case.[105] At this point the Court, notably, went on to discuss under what circumstances an attempt at unilateral secession could be successful. The Court argued:

> The ultimate success of . . . a [unilateral] secession would be dependent on recognition by the international community, which is likely to consider the legality and legitimacy of secession having regard to, amongst other facts, the conduct of Québec and Canada, in determining whether to grant or withhold recognition.[106]

This pronouncement of the Supreme Court of Canada can hardly be squared with the declaratory theory, which advocates the view that recognition merely acknowledges the fact of the existence of a new State.[107] Indeed, the Court made this clear: where an attempt at secession is unilateral, international recognition may produce rather than acknowledge the fact of the existence of a new State; in other words, recognition may constitute a new State.

The constitutive effects of recognition may also follow from the doctrine of remedial secession. This doctrine is based on an inverted reading of the principle of territorial integrity of States in the Declaration on Principles of International Law. According to this reading, a State that does not have 'a government representing the whole people belonging to the territory without distinction as to race, creed or colour'[108] cannot invoke the principle of territorial integrity in order to limit the peoples' right of self-determination to

[101] See, eg, *Quebec* case, para 126.

[102] Consider the following argument from A Orakhelashvili, 'Statehood, Recognition and the United Nations System: A Unilateral Declaration of Independence in Kosovo' (2009) 12 Max Planck Yearbook of United Nations Law 1, 13: 'As soon as the principle of territorial integrity applies, it necessarily outlaws secession without the consent of the parent state. Such understanding avoids systemic inconsistency under which international law would guarantee territorial integrity yet would not prohibit secession.'

[103] See, eg, Crawford (n 11) 390, arguing that secession is 'a legally neutral act the consequences of which are regulated internationally'.

[104] See above n 15.

[105] *Quebec* case, para 155.

[106] ibid.

[107] cf n 4.

[108] See the Declaration on Principles of International Law (n 15), annex, principle 5.

the exercise of this right in its internal mode.[109] Some authors see remedial secession as a *right* of oppressed peoples.[110] Yet international law *de lege lata* does not suggest that independence would be an entitlement in any situation other than classical 'salt-water' colonialism.[111]

In this context Shaw argues that:

> such a major change in legal principle cannot be introduced by way of an ambiguous subordinate clause, especially when the principle of territorial integrity has always been accepted and proclaimed as a core principle of international law, and is indeed placed before the qualifying clause in the provision in question.[112]

He then continues by reasoning that 'recognition may be more forthcoming where the secession has occurred as a consequence of violations of human rights'.[113] This explanation comes close to the position of the Supreme Court of Canada in the *Quebec* case in relation to unilateral secessions.[114]

In the end, remedial secession in contemporary international law is still (an attempt at) unilateral secession: neither prohibited nor an entitlement. However, when oppression is an issue, foreign States may find the claim to independence to be more legitimate and are more likely to grant recognition in such circumstances. Thus, in international law *de lege lata* the doctrine of remedial secession can only be given effect through recognition. This is then another instance where the constitutive effects of recognition are admitted through the back door.

As has been acknowledged even by writers who expressly endorse the declaratory theory, where recognition is collective it may be difficult to differentiate it from collective State creation. In this regard Crawford argues:

> in many cases, and this is true of the nineteenth century as of the twentieth, international action has been determinative [for new State creations]: international organizations or groups of States—especially the so-called 'Great Powers'—have exercised a collective authority to supervise, regulate and condition . . . new state creations. In some cases the action takes the form of the direct establishment of the new State: a constitution is provided, the State territory is delimited, a head of

[109] For a thorough account of the academic support for 'remedial secession', see A Tancredi, 'A Normative "Due Process" in the Creation of States Through Secession' in M Kohen (ed), *Secession: International Law Perspectives* (Cambridge 2006) 171, 176.

[110] See, eg, A Buchanan, *Justice, Legitimacy, and Self-Determination* (Oxford 2004) 335, arguing: 'If the state persists in serious injustices toward a group, and the group's forming its own independent political unit is a remedy of last resort for these injustices, then the group ought to be acknowledged by the international community to have the claim-right to repudiate the authority of the state and to attempt to establish its own independent political unit.'

[111] See generally J Vidmar, 'Remedial Secession in International Law: Theory and (Lack of) Practice' (2010) 6 St Antony's International Review 37.

[112] M Shaw, 'Peoples, Territorialism and Boundaries' (1997) 8 EJIL 478, 483.

[113] ibid 483.

[114] See above, text to n 106.

> State is nominated. In others it is rather a form of collective recognition—although the distinction is not a rigid one.[115]

Collective State creations are therefore not only a matter of direct multilateral state-making, as, for example, at the Congress of Berlin[116] or settlements after both world wars.[117] Nor are they are always a matter of institutionalized international action. Collective State creations can also be a consequence of informal agreement and/or 'concerted practice' among certain States. It is the act of recognition that can be used as a tool of the informal creation of a new State. But is this not to say that recognition can create a State?

In this context Weller notes that it may be that a State creation could

> depend on a grant of legal authority . . . Such a grant might be made either by the predecessor states through their consent to secession or perhaps, exceptionally, by collective international action of the UN Security Council or widespread recognition triggered by the opposed, but effective, unilateral creation of statehood.[118]

By holding that recognition could be seen as a grant of legal authority for State creation, this argument carefully implies that *widespread* recognition could be constitutive of a new State. However, the argument then tries to escape from the 'constitutive trap' and becomes circular. Indeed, if States can be created on the basis of a 'grant of legal authority' and if this authority can be granted by widespread recognition, this does not mean that recognition was '*triggered by* the opposed, but effective, unilateral creation of statehood' but rather that widespread recognition *led to* the 'unilateral creation of statehood', even though this was opposed by the parent State.

To avoid such logical inconsistencies, it might be worthwhile acknowledging that, where a unilateral secession is at issue, universal recognition may constitute a new State. It is notable that Weller refers to 'widespread recognition', which implies that there could be a difference between the legal effects of recognition that is widespread and those of recognition that is not widespread. But the problem is that it is impossible to quantify when the threshold is met where recognition becomes *widespread enough* to be considered a grant of legal authority, which would result in a new State creation.

Indeed, when acknowledging some constitutive effects in the act of recognition, caveats accompanying the constitutive theory need to be considered.[119] In this context, Warbrick notes in respect of the international legal responses to the situation in the SFRY: 'What was at stake in Yugoslavia was an attempt at constituting States by recognition, an experiment which first

[115] Crawford (n 11) 501. [116] ibid 508. [117] ibid 516–22.
[118] M Weller, 'Modesty Can Be a Virtue: Judicial Economy in the ICJ *Kosovo* Opinion' (2011) 24 Leiden J Int'l L 127, 129–30. [119] See above, text to n 4.

failed and which is still not conclusive. The activity in Yugoslavia and elsewhere . . . is an exercise in state-building.'[120] It was argued above that the dissolution of the SFRY was ultimately a situation where recognition was declaratory.[121] Nevertheless, Warbrick's observation illustrates well the problem of (attempts at) collective State creation through recognition. If collective recognition by certain States is considered as equivalent to a State creation, the inevitable question that follows is how many and whose recognitions are necessary for collective recognition to be seen as a State creation. This problem will be further discussed in the examples of Bangladesh and Kosovo.

B. The Old Problem of the Constitutive Theory: How Many and Whose Recognitions Are Necessary?

Bangladesh is sometimes invoked as the only clear example of a successful unilateral secession in the UN Charter era and could even be a case in support of remedial secession.[122] This conclusion needs to be qualified with references to legal effects of recognition.

East Pakistan (Bangladesh) declared independence on 17 April 1971.[123] Upon the emergence of an armed conflict between East Pakistani and Pakistani armed forces,[124] India intervened in support of East Pakistan. India then extended recognition of East Pakistan on 6 December 1971[125] and Pakistani armed forces surrendered on 17 December 1971.[126] With the help of Indian forces, East Pakistani authorities exercised substantial control over the territory that became known as Bangladesh. Within weeks, Bangladesh was explicitly recognized by 28 States.[127] Recognition was thus not universal.

More than two years later, on 22 February 1974, Bangladesh was recognized by Pakistan.[128] Only then did recognition become universal, and Bangladesh was admitted to the UN on 17 September 1974.[129] Thus, for about two years the legal status of Bangladesh was ambiguous and it is unclear whether recognition really undoubtedly created a new State. The ambiguity was overcome only after Pakistan consented to Bangladesh's independence.

In the case of Kosovo, an attempt was made to secure approval of its parent State and confirm Kosovo's path to independence with a UN Security Council resolution. After this attempt failed, a group of States decided to lead Kosovo to independence without Serbia's consent or a Security Council resolution.[130]

[120] C Warbrick, 'States and Recognition in International Law' in M Evans (ed), *International Law* (2nd edn, Oxford 2006) 262.
[121] See above, n 82.
[122] See, eg, Crawford (n 11) 141–2 and 393.
[123] A Pavković and P Radan, *Creating New States: Theory and Practice of Secession* (Ashgate 2007) 102.
[124] ibid.
[125] Crawford (n 11) 141.
[126] ibid.
[127] ibid.
[128] ibid.
[129] ibid. See also UNGA Res 3203 (XXIX) (17 September 1974).
[130] See media reports in the days before Kosovo declared independence, eg, 'Talks on Kosovo Hit a Dead End, Rice Says' *New York Times* (New York, 8 December 2007) <http://query.nytimes.

Evidence exists to show that Kosovo declared independence with the prior approval of a number of States, which also promised recognition in advance.[131] In the absence of Serbia's consent, some of the recognizing States believed that informally practised collective recognition and prior approval of the declaration of independence could have state-creating effects.[132]

Kosovo is thus one example where it is difficult to differentiate between recognition and an attempt at collective state creation.[133] However, recognition of Kosovo, though granted by a significant number of States, is far from universal. It is therefore questionable whether this attempt at State creation was successful. Furthermore, it may well be that recognition did not solve but actually created the ambiguity with regard to Kosovo's legal status. Before the number of recognitions was granted, it was clear that Kosovo was not a State. This is now unclear and remains unclear even after the *Kosovo* Advisory Opinion, where the ICJ avoided any reference in respect of Kosovo's legal status.[134]

Is Kosovo a State? If so, would it be a State without the recognitions that have been granted? If recognition is always declaratory, why should Kosovo be considered a State now, if it was not after the declaration of independence in 1991?[135] The FRY's claim to territorial integrity existed then, and Serbia's claim to territorial integrity exists now. The government that declared independence in 1991 was not the effective government of Kosovo,[136] and the government that declared independence in 2008 was not an independent government of Kosovo.[137] Similar legal considerations regarding Kosovo's

com/gst/fullpage.html?res=9F06E4DB1F3EF93BA35751C1A9619C8B63&scp=94&sq=kosovo&st=nyt> accessed 22 February 2012; 'Here Comes Kosovo' *New York Times* (New York, 14 February 2008) <http://www.nytimes.com/2008/02/14/opinion/14cohen.html?scp=57&sq=kosovo&st=nyt>, accessed 22 February 2012.

[131] ibid.

[132] In this context see the following argument: 'Statements . . . [of some government] that Kosovo *is* independent are little more than feeble attempts to substitute a constitutive approach to recognition for the widely accepted declaratory theory. Such assertions fly in the face of the consensus that Security Council Resolution 1244 continues to apply to the territory of Kosovo, and it might be noted that the "preliminary legal assessment" of the United Nations is that "the opinion does not affect the status of UNMIK or a status-neutral policy".' H Hannum, 'The Advisory Opinion on Kosovo: An Opportunity Lost, or a Poisoned Chalice Refused' (2011) 24 Leiden J Int'l L 155, 156 (emphasis in original).

[133] cf text to n 115.

[134] The ICJ specifically observed that the question posed to the Court did 'not ask whether or not Kosovo has achieved statehood'. *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion) 22 July 2010, ICJ Rep 2010, para 51 (*Kosovo* Opinion).

[135] The unofficial parliament of Kosovo Albanians issued a declaration of independence on 22 September 1991. See M Weller, *Contested Statehood: Kosovo's Struggle for Independence* (OUP 2009) 39.

[136] After Serbia abolished Kosovo's autonomy in 1989, Kosovo Albanians created unofficial parallel state organs. In 1991, independence was declared by these organs, which were not in effective control of Kosovo. See N Malcolm, *Kosovo: A Short History* (Macmillan 1998) 48.

[137] Kosovo remains governed by the regime of the international territorial administration, established under UN Security Council resolution 1244, adopted under Chapter VII of the UN Charter. See UNSC Res 1244 (10 June 1999) especially paras 5, 6 and 7. The limitations on

status as a State under international law therefore existed in 1991 as exist now. Notably, however, after the declaration of independence in 1991, recognition was only granted by Albania, while after the 2008 declaration of independence recognition has been granted by 88 States.[138]

The most probable answer is that, in the case of Kosovo, an informally practised collective recognition aimed to have the effects of a collective State creation. The problem, however, is that the new State creation is not acknowledged by the entire international community. To put it differently, if recognition has constitutive effects, are 88 recognitions enough for a State creation? How many and whose recognitions are in such circumstances necessary for an entity to be considered a State? On the other hand, whose and how many *withholdings* of recognition are necessary that an entity *is not* considered a State? Is Kosovo a State because it has been recognized by 88 States or is it not a State because it has been recognized by *only* 88 States? This dilemma illustrates well the problem of the constitutive theory. Yet it also illustrates the shortcoming of the declaratory theory. It is precisely the high number of recognitions that led to the current situation, in which Kosovo's legal status is at least ambiguous.

It is possible to make an objection that Kosovo is a misuse of the act of recognition for the purpose of an attempt at State creation,[139] or even that recognition was granted on political and not legal grounds, but such arguments

independence of Kosovo's government are specifically accepted by the Constitution of the Republic of Kosovo, adopted on 9 April 2009. Article 147 of the Constitution provides: 'Notwithstanding any provision of this Constitution, the International Civilian Representative shall, in accordance with the Comprehensive Proposal for the Kosovo Status Settlement dated 26 March 2007, be the final authority in Kosovo regarding interpretation of the civilian aspects of the said Comprehensive Proposal. No Republic of Kosovo authority shall have jurisdiction to review, diminish or otherwise restrict the mandate, powers and obligations …'. The Constitution here refers to the so-called Ahtisaari Plan, which foresees Kosovo's 'supervised independence', whereby institutions of Kosovo's government remain subordinated to the authority of the international territorial administration. See UN Doc S/2007/168 (16 March 2007). Kosovo thus legally accepted the continuous presence of the supreme international authority, which poses notable restraints on its sovereignty. It is therefore obvious that Kosovo does not have an independent government. 'Government' is, however, one of the four Montevideo criteria of statehood. A government of a State needs not only to exist as an authority but also to exercise effective control in the territory of a State, as well as to operate independently from the authority of governments of other States. See A Aust, *Handbook of International Law* (CUP 2005) 136–7. In this regard, the International Commission of Jurists held that the Finnish Republic in the period 1917–1918 did not become a sovereign State 'until the public authorities had become strong enough to assert themselves throughout the territories of that State without the assistance of foreign troops': *Report of the International Committee of Jurists Entrusted by the Council of the League of Nations with the Task of Giving an Advisory Opinion upon the Legal Aspects of the Aaland Islands Question*, League of Nations Official Journal spec supp 3 (1920) 8–9. In regard to Kosovo, it evidently has a government independent of Serbia. However, what is required under the criteria of statehood is a government independent of any other government and not only independent of a particular one.

[138] As of 22 February 2012, Kosovo has been recognized by 88 States. See 'Who Recognized Kosova as an Independent State?' <http://www.kosovothanksyou.com> accessed 22 February 2012.

[139] cf n 120.

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are not persuasive. Recognition is always a political act, but one that is also capable of having legal consequences.[140] Only an obligation to withhold recognition may be required by law,[141] while the decision on whether or not recognition would be granted is a matter of policy. It was shown above that international law does not prohibit unilateral secession and actually presupposes that the ultimate success of an attempt at unilateral secession 'would be dependent on recognition by the international community'.[142] Moreover, the obligation to withhold recognition is not triggered by the unilateral character of a claim to independence.[143] It thus follows that, where an effective entity does not emerge illegally,[144] nothing precludes foreign States from granting recognition. Granting recognition to an attempt at unilateral secession is then neither illegal nor extra-legal under international law. If recognition of an attempt at unilateral secession is granted universally, the political act of recognition may well create a new legal fact – that of the emergence of a new State.

This section has shown that both theories of recognition are difficult to square with the practice of the emergence of new States. The declaratory theory may work in clear situations, where no competing claim to territorial integrity exists. Yet, if an entity tries to emerge as a State against the wishes of its parent State, it seems to be presupposed that recognition could have constitutive effects. However, success of a unilateral secession in the UN Charter era is very unlikely and practice of a widespread but not universal recognition is very rare.

Therefore, recognition is, in theory, capable of creating a new State. But this mode of State creation requires recognition to be virtually universal and may effectively be seen as a tool of collective State creation. If recognition of an attempt at collective State creation is not virtually universal, the legal status of the entity in question will remain ambiguous.

IV. THE OBLIGATION TO WITHHOLD RECOGNITION: IMPLICATIONS OF THE CONSTITUTIVE EFFECTS OF RECOGNITION

Although States are never under an obligation to grant recognition, under some circumstances international law requires that recognition must be withheld. This is when effective entities emerge illegally.[145] This section argues that the

[140] R McCorquodale, 'The Creation and Recognition of States' in S Blay, R Piotrowicz and BM Tsamenyi (eds), *Public International Law: An Australian Perspective* (OUP 2005) 193. See also M Shaw, *International Law* (CUP 2008) 207.

[141] See below nn 148–151 and accompanying text.

[142] *Quebec* case, para 155.

[143] This follows from the view that international law is neutral in regard to the question of secession (see text to n 106) and also from the position of the Supreme Court of Canada in the *Quebec* case.

[144] For discussion on illegal entities see below nn 153–5 and accompanying text.

[145] See, eg, J Dugard, *Recognition and the United Nations* (Grotius Publications 1987) 135–7 and 152–61 and Crawford (n 11) 105.

obligation to withhold recognition is another concept in international law that presupposes that universal recognition could create a State.

The illegality of a State creation is determined by a (potential) emergence of a State in violation of certain fundamental norms of international law. In this regard, the ICJ held in the *Kosovo* Advisory Opinion that a new State creation would be illegal where it results from 'the unlawful use of force or other egregious violations of norms of general international law, in particular those of a peremptory character *(jus cogens)*'.[146]

The obligation to withhold recognition in the circumstances of an (attempt at) illegal State creation has developed under customary international law and is reflected in the practice of States and UN organs.[147] It has also been adopted in the International Law Commission (ILC) Articles on State Responsibility.[148] Article 41(2) provides that 'no State shall recognize as lawful a situation created by a serious breach [of *jus cogens*] nor render aid or assistance in maintaining that situation'.[149] It further specifies that States owe an obligation *erga omnes* to withhold formal or implied recognition of an effective territorial situation, created in breach of *jus cogens*.[150] According to the Commentary to the ILC Articles on State Responsibility, the prohibition of illegal use of force, the right of self-determination and the prohibition of racial discrimination are among the norms of *jus cogens* character.[151]

In the perception of some writers, the requirements that a State may not be created as a result of illegal use of force, in breach of the right of self-determination and/or in pursuance of racist policies, have become additional statehood criteria, which supplement the set of the effectiveness-based traditional statehood criteria, originating in the Montevideo Convention.[152]

[146] *Kosovo* Opinion, para 81.

[147] Prime examples of non-recognition of illegally created effective entities are collective responses to Turkey's illegal use of force in Cyprus, and thus resulting creation of the putative State of the Turkish Republic of Northern Cyprus (TRNC), as well as responses to the declarations of independence of Southern Rhodesia and South African Homelands, which were issued in violation of the right of self-determination and in pursuance of racist policies. See resolutions on the TRNC: SC Res 541 (18 November 1983); Southern Rhodesia: GA Res 1747 (XVI) (27 June 1962), SC Res 202 (6 May 1965), GA Res 2022 (XX) (5 November 1965), GA Res 2024 (XX) (11 November 1965), SC Res 216 (12 November 1965), SC Res 217 (20 November 1965), SC Res 277 (18 March 1970); the South African Homelands: GA Res 2671F (8 December 1970), GA Res 2775 (29 November 1971), GA Res 31/6A (26 October 1976), GA Res 402 (22 December 1976), GA Res 407 (25 May 1977), GA Res 32/105 N (14 December 1977), GA Res 34/93 G (12 December 1979), GA Res 37/43 (3 December 1982), GA Res 37/69A (9 December 1982). Notably, of the relevant Security Council resolutions, only Resolution 277 on Southern Rhodesia was adopted under Chapter VII of the UN Charter, yet universal compliance was nevertheless achieved.

[148] ILC Articles on State Responsibility (n 10) arts 40 and 41.

[149] ibid art 41(2).

[150] Commentary to Article 40, United Nations International Law Commission, Report on the Work of its Fifty-third Session (23 April–1 June and 2 July–10 August 2001) UN Doc A/56/10/2001/283.

[151] Commentary to Article 41, ibid 286–90.

[152] The Montevideo Convention on Rights and Duties of States, in its Article 1, provides: 'The State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other states' (Montevideo Convention on Rights and Duties of States 165 LNTS 19 (1933) art 1).

However, this interpretation is not universally accepted and others may see the concept of the additional statehood criteria as problematic and rather reflective of recognition requirements.[153] In this perception, an illegally created effective entity is an illegal *State*.[154]

For the purpose of this article the difference between these two interpretations will not be examined thoroughly. At this point it is important to stress simply that the proponents of both interpretations agree that, in situations of territorial illegality, States are under an obligation to withhold recognition.[155] This obligation may well imply that recognition could create a new State.

Advocates of the declaratory theory who adopt the concept of the additional set of legality-based statehood criteria argue that the purpose of collective withholding of recognition to illegally created entities is not because recognition could constitute statehood of such an entity but merely an affirmation of a legally non-existent situation. One such argument is well captured in the following paragraph:

> the obligation of non-recognition has a declaratory character in the sense that States are considered to be under a legal obligation not to recognize a specific situation which is *already* legally non-existent. Thus, the obligation of withholding recognition is not the cause of the fact that an illegal act does not produce the intended results, that is, legal rights for the wrongdoer. Non-recognition merely declares or confirms that fact and the obligation not to grant recognition prevents the validation or 'curing' of the illegal act or the situation resulting from that act.[156]

Such an argument is not entirely persuasive. As Talmon contends, the call for collective non-recognition of an illegally created effective entity implies only that such an entity could become a State through recognition, and proponents of the declaratory theory do not adequately prove that this is not so.[157] If the first premise is that an illegally created effective entity is not a State and the second premise is that the purpose of collective withholding of recognition is prevention of territorial integrity from being 'cured', it is indeed difficult logically to explain why recognition, if granted universally or almost universally, could not create a new State. A 'cured illegality' in this context

[153] See, eg, Talmon (n 12) 126.

[154] ibid.

[155] ibid 148, arguing that '[n]on-recognition *as a State* in response to a violation of international law has, in contrast to the politically motivated non-recognition *of a State*, a clearly defined scope. In the case of non-recognition as a State, it is not the individual State's subjective will to recognize . . . but the objective legal status of "State" that is at issue' (emphases in original). Crawford (n 11) 160, argues that, when the illegality in question is substantial, 'States have a duty under customary international law not to recognize the act as legal. The norm in question must be one of the limited number of peremptory norms or, at any rate, a substantive rule of general international law, so that the illegality is one that involves the international community as a whole and not just particular States.'

[156] Raič (n 76) 105 (emphasis in original).

[157] Talmon (n 12) 138.

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can only mean that, despite its illegal creation, an effective entity could become a State via recognition.

To explain the purpose of the obligation to withhold recognition, Hillgruber thus simply adopts the constitutive view and argues that:

> It is only by recognition that the new state acquires the status of a sovereign state under international law in its relations with the third states recognizing it as such. If it were to acquire this legal status before and independently of recognition by the existing states . . . this legal consequence under international law would occur automatically and could no longer be prevented by withholding recognition of the entity as a state.[158]

This explanation is problematic. It was shown above that, under some circumstances, there will be no doubt that universally non-recognized entities are actually States,[159] and recent practice does not support the view that 'only by recognition . . . the new state acquires the status of a sovereign state under international law'. For this reason, Hillgruber's argument cannot be accepted.

In another explanation, however, recognition remains declaratory regardless of the circumstances. Instead of admitting the constitutive effects of recognition, this explanation removes the premise that an illegally created effective entity is not a State and argues that the 'additional statehood criteria' are not statehood criteria but rather recognition requirements.[160] In this view,

> adherents of the declaratory theory were forced to develop additional criteria for statehood, which in the case of the collectively non-recognized States were obviously not met, in order to explain non-recognition as confirming the objective legal situation [that an illegally created effective entity is not a State].[161]

Not acknowledging that illegally created effective entities are States is the 'original sin', which leads to two problems: (i) implying constitutive effects to the act of recognition; and (ii) treatment of some recognition requirements as statehood criteria. Talmon consequently argues that '[t]he collectively non-recognized States may be "illegal States" [but] they are nevertheless still "States"'[162] and that 'the additional criteria of legality proposed are not criteria for statehood but merely conditions for recognition, *viz* reasons for not recognizing *existing* States'.[163] In this perception, only the rights stemming from statehood are withheld by collective non-recognition, not the status of a State itself:[164]

> The creation of a State cannot be undone by non-recognition alone, and so non-recognition cannot have *status-destroying* effect either. What can be done, however, is to withhold the rights inherent in statehood from a new State. To that extent, non-recognition has a negatory, ie a *status-denying*, effect.[165]

[158] Hillgruber (n 13) 494.
[159] See above, section II.C.
[160] Talmon (n 12) 125.
[161] ibid 120–1.
[162] ibid 125.
[163] ibid 126 (emphasis in original).
[164] ibid 180.
[165] ibid (emphasis in original).

Although the critique of the constitutive nature of recognition, implied by the concept of the additional statehood criteria and the doctrine of collective non-recognition, is well made, the alternative interpretation of the doctrine of collective non-recognition is also problematic. The argument introduces the concept of 'illegal States'. Since this concept employs the word 'States', it accepts that collectively non-recognized illegal States are *prima facie* States and, since they are already States, no constitutive effects are ascribed to the act of recognition.

The problem is that such States are qualified with the adjective 'illegal', which instantly makes these States somewhat different from those States that are not illegal. Unlike 'States', 'illegal States' in this perception do not have the full attributes of statehood. By holding that non-recognition 'only' withholds 'the rights inherent in statehood',[166] it is actually implied that recognition could endow an 'illegal State' with full attributes of statehood. And this, in fact, means that constitutive effects of recognition are admitted through the back door and the problem merely pushed to another level: it is not a State itself that could be constituted by recognition; it is 'only' the attributes of statehood that could be constituted if recognition were not withheld.

Moreover, the concept of 'illegal States' accepts that an 'illegal State' does not have all the rights stemming from statehood: that is, it does not have all the attributes of statehood. It is difficult to accept that two types of State exist under international law—those with all and those with only some attributes of statehood. In order to accept this argument, one would also need to accept the notion of some States being more equal than others.[167] This seems to be unacceptable from the perspective of sovereign equality of States.[168] On the other hand, the concept of additional statehood criteria does not lead to the problem of having two types of States. By not having all attributes of statehood, illegally created effective entities (ie non-States) do not disturb the principle of sovereign equality of States.

The theory and practice in contemporary international law do not support the view that 'only by recognition . . . the new state acquires the status of a sovereign state under international law'.[169] At the same time, recognition will not always merely *acknowledge* the fact of the existence of a new State. In some circumstances, recognition could *create* a new State. In this vein, the obligation to withhold recognition (on legal grounds) cannot be explained without generating logical inconsistencies if what was established above is not acknowledged: universal recognition may have the effects of a collective State creation.[170] And if the obligation to withhold recognition of an illegally created

[166] ibid.
[167] This does not mean that non-recognized States cannot exist. See section II.C. for examples of the FRY and Macedonia.
[168] UN Charter, art 2(1).
[169] Hillgruber (n 13) 494.
[170] See above, section III.A.

effective entity did not apply, a universal or near-universal recognition could create a new State and thus 'cure' the underlying territorial illegality.

Admitting that in some circumstances recognition could have constitutive effects is not the same as saying that a State cannot exist if it is not recognized. States clearly can exist without being recognized.[171] Yet the declaratory nature of recognition cannot be defended in all circumstances. The concepts of unilateral secession and the obligation to withhold recognition on legal grounds imply, and indeed presuppose, that universal recognition could create a State.

V. CONCLUSION

In contemporary international law, recognition is generally seen as a declaratory act.[172] This is indeed the only plausible explanation in situations where the emergence of a new State is not contested. This article has shown that this is (i) where the predecessor State either no longer exists or consents to secession; and (ii) where the emergence of a new State is not or would not be connected with a breach of certain norms that determine territorial illegality, in particular those of *jus cogens* character.[173]

However, recognition and political non-recognition in these circumstances do not have the same legal effects as do recognition in the circumstances of unilateral secession and non-recognition on legal grounds. Where an entity tries to emerge as a State against the wishes of its parent State, this creates the legal circumstances of (an attempt at) unilateral secession. Unilateral secession is not prohibited under international law, but neither is it an entitlement.[174] The success of (an attempt at) unilateral secession will depend on the reaction of the international community, namely to the question of whether or not recognitions are granted.[175] This implies, however, only that recognition may create a State. At least, this is so in theory.

Practice reveals that, where an entity tries to emerge as a State against the wishes of its parent State, its legal status will remain ambiguous until the consent of the parent State is given.[176] In order for a State to be unambiguously created through recognition and against the wishes of its parent State, recognition would need to be virtually universal and would have the effects of a collective State creation.[177] This kind of practice is lacking and, with 'only' 88 recognitions to date, not even Kosovo is a strong example of a successful State creation through recognition and against the competing claim to territorial integrity by its parent State.

[171] See above, section II.C.
[172] See n 5.
[173] See n 146.
[174] See notes 101–106.
[175] See *Quebec* case, para 155.
[176] See above, section III.B.
[177] See notes 115–128.

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Constitutive effects of recognition are also implied by the doctrine of collective non-recognition. If an illegally created effective entity attracted virtually universal recognition, it would be difficult to claim that it was not a State. Not even the explanation that non-recognized illegally created effective entities are actually States, albeit illegal ones, resolves the problem. The concept of 'illegal States' provides for an explanation that non-recognition has to do with the adjective 'illegal' and does not interfere with the noun 'State'. However, in so doing the explanation introduces the difference between those States that have and those States that do not have full attributes of statehood, whereby full attributes of statehood are withheld through non-recognition. This article has argued that such an explanation merely reintroduces the constitutive effects of recognition through the back door.

To avoid such logical inconsistencies, this article has suggested that the explanation of the legal effects of recognition and non-recognition should not rest on the premise that recognition is declaratory in all circumstances. Indeed, the understanding of the legal nature of recognition and political non-recognition of States that emerge in the absence of a competing claim to territorial integrity and in the absence of an *erga omnes*-applicable obligation to withhold recognition cannot be extended to all other situations in which the question of recognition and non-recognition arises. The legal nature of recognition and non-recognition is different where unilateral secession and collective withholding of recognition on legal grounds are at issue. The two concepts actually presuppose that recognition could create a State. Widespread recognition leads at least to ambiguity regarding the legal status of an entity, whereas such ambiguity would not exist in the absence of such recognition. Moreover, if recognition is universal, this may create rather than acknowledge the fact of the emergence of a new State.

Declaratory recognition should not be taken as a dogma. Saying that in some circumstances recognition can create a State is not the same as saying that non-recognized States cannot exist. These are two different concepts. For example, the legal effects of recognition of Kosovo in 2008 cannot be compared to the legal effects of non-recognition of Macedonia in 1992. This article has demonstrated that the effects of international recognition and non-recognition are determined by the underlying territorial situation and the mode of State creation.